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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 299

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SOUTHWESTERN BELL TELEPHONE COMPANY,
*Appellant,*

*vs.*

CARRIE C. LEE,
*Appellee.*

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## STATEMENT IN SUPPORT OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

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### Preliminary Statement.

With the object of a better understanding of this case, the appellant believes the recitation of a bit of historical matter in explanation of the record, although to some extent antedating it, may be helpful.

Several years ago, the appellant, in the conduct of its telephone utility business in Arkansas, commenced a campaign to enforce its Rule V-c, as it is generally known in the record. This rule reads:

> "USE OF CUSTOMER SERVICE—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or persons residing in the customer's household, except

> as the use of the service may be extended to joint users. The Telephone Company has the right to refuse to install customer service or to permit such a service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the instrument is so located that it is not accessible for public use."

As a result of this campaign of enforcement, the City of Fort Smith enacted an ordinance which had the effect of setting aside the rule. This ordinance was validly enacted under the Arkansas Utilities Act establishing a dual form of utility regulation—a delegation of authority to regulate utilities, both to the cities, and to the State Commission, there called the Department of Public Utilities, with revisory control over city ordinances by the Department on what is commonly known as appeal.

The ordinance of the City of Fort Smith was appealed to the Department by the appellant here, and the Department found, after a considerable hearing, that the ordinance was unreasonable, and that the appellant's rule was reasonable, and the Department ordered the vigorous enforcement of the rule throughout the state (its opinion and order are in the record here). The validity of this order was affirmed, on appeal, by the Supreme Court of Arkansas. (*City of Fort Smith* v. *Department of Public Utilities*, 195 Ark. 513, 113 S. W. 2d 100). In order to avoid the penalties of the Utilities Act, appellant had no alternative save to enforce the rule, whereupon appellant was held liable for statutory penalties, under Section 14261, *infra*, on account of said enforcement.

The rule, by its clear terms, restricts the use of customer telephone service, under customer rates, to the customer, his family, his employees, and his business associates. If

service is wanted for others as well, the classification of service is no longer the customer classification, but is the semi-public classification, to which different rates apply as indicated in the appellant's filed tariffs which are in the record here.

This case originated in a written demand by the plaintiff below that, in substance, the appellant provide her with service of the semi-public classification (to which the rule would not apply), at the rate for service of the customer classification (to which the rule would apply). The appellant refused to comply with this written demand because to do so would be to violate the Arkansas Utilities Act requiring that the filed rates must not be departed from (Pope's Digest, Sec. 2075).

Thereupon the plaintiff below instituted this action for the recovery of penalties provided by the laws of Arkansas (Pope's Digest, Sec. 14261), reading:

> "Discrimination—Penalty. Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction, upon any such applicant that is not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under a penalty of one hundred dollars, and five dollars per day for each day from the expiration of said notice until said demand is complied with or suit is instituted for penalty for failure to comply with said demand, for such discrimi-

nation, after compliance or offer to comply with the reasonable regulations of such company and the time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. And any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same and the court shall hear such applications either in vacation or in term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith, until such orders are vacated by order of the court or the judge at chambers, or such suit is finally determined."

The plaintiff's claim at the trial of the cause was, not that the rule was unreasonable, but that other customers were violating the appellant's rule, or were receiving service of the semi-public classification at the lower rate for the customer classification, and that the refusal of the appellant to violate the Utilities Act in his case, by providing semi-public service at the customer rate, subjected the appellant to the penalties of Section 14261.

The Supreme Court of Arkansas affirmed plaintiff's judgment by declaring the rule unreasonable in a collateral proceeding, although the same rule had been earlier declared reasonable by the regulatory tribunal.

**Statutory Provision Sustaining Jurisdiction of the Supreme Court of the United States.**

This Court has jurisdiction of this cause under Judicial Code, Section 237 as amended (28 U. S. C. A. 344), which provides:

"(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in

question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion award execution or remand the cause to the court from which it was removed by the writ.

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph." (R. S. Sections 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Sections 1, 43 Stat. 937.)

28 U. S. C. A. Sections 344 (a) and 344 (b) and under 28 U. S. C. A., Sections 861 (a) and 861 (b):

> "(a) The writ of error in cases, civil or criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal (Jan. 31, 1928, c. 14, Sec. 1, 54 Stat. 54).
>
> "(b) The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which Section 861 (a) of this title substitutes for a writ of error. (Jan. 31, 1928, c. 14, Sec. 2, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466.)"

**Statute of Arkansas, Validity of Which is Involved.**

The validity of the statute of Arkansas (Pope's Digest, sec. 14261, as interpreted in the decision of the Arkanass court in this cause, see *Ward* v. *Krinsky*, (1922) 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033) is here involved. The statute has heretofore been quoted herein, verbatim.

There is further more involved herein the action of the Supreme Court of Arkansas in adjudging the appellant's aforesaid rule to be unreasonable, when it did so in a collateral action—without any statutory delegation of authority to perform this legislative function—and did so without any evidence to support its finding that the rule was unreasonable.

The only statute of Arkansas that could conceivably authorize the court so to act legislatively is the selfsame penalty statute, sec. 14261, and if it could be so construed, the validity of that statute is again challenged for its constitutional imperfections.

The appearance is that the Supreme Court of Arkansas acted legislatively in this case, in complete disregard of the

statutes, and without any statutory authority to act legislatively, whereas if it had had statutory authority to act as it did in this case, the validity of the statute under which it might have so acted would have also been here challenged and involved.

**Date of Judgment and Application for Appeal.**

The judgment sought to be reviewed was entered in the lower court on May 8, 1939, by the Supreme Court of Arkansas, the highest court of the State, on April 8, 1940, and appellant's petition for rehearing in the Supreme Court of Arkansas, was denied June 3, 1940. Application for appeal to the Supreme Court of the United States was presented and granted June 27, 1940.

**Stage at Which the Federal Questions Were Raised.**

The Federal questions (all involving the Federal constitution) were first raised on petition for rehearing, in the Supreme Court of Arkansas, except as the appellant in its briefs before said court undertook to demonstrate the unconstitutional consequences of such a decision as the court reached. These considerations were offered, however, not so much to raise questions of constitutionality, as to influence an interpretation of the penalty statute which would permit it to conform with the constitution. The appellant, under statutory injunction, particularly in view of the order of the regulatory body, was obliged to enforce its rule, and it could not have anticipated a decision that its rule would be declared unreasonable, and that it could be declared so in a collateral proceeding for the first time by an appellate court, without evidence, and without notice and hearing, and without any issue being tendered in the trial court. The constitutional questions were raised in the petition for rehearing, in substantially the same language as contained in the accompanying assignments of errors. Appel-

lant had no earlier opportunity to raise the Federal questions.

The Supreme Court of Arkansas disposed of the Federal questions so raised in the petition for rehearing by denying the petition without comment by *per curiam* opinion dated June 3, 1940.

**The Federal Questions Are Substantial.**

All of the Federal questions here raised have to do with the invasions of the appellant's rights vouchsafed by the 14th Amendment to the Constitution of the United States; and as such all these questions are substantial.

**The Substantial Federal Questions Involved.**

1. The court so construed the penalty statute under the circumstances of this case, as to deprive appellant of its property.

At no time in the trial of the case in the circuit court, nor in the briefs presenting the case to the Supreme Court of Arkansas, was the reasonableness of the appellant's rule V-c questioned, even if we indulge the rash assumption that it could be questioned in a collateral proceeding. Not until the decision of the Supreme Court of Arkansas did appellant apprehend that there was, or could be, any contention that the rule was unreasonable, or that by any chance such an interpretation could be put upon it in this case.

Under these circumstances, the assessment of penalties, although the appellant in good faith sought to enforce said rule in obedience to the order of the Department of Public Utilities, amounts to a construction of the penalty statute, Section 14261, so as to take appellant's property without due process of law and deny to it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States. In an analogous case, almost a dead

parallel, where the predecessor of this appellant was enforcing a rule which it had every reason to believe was reasonable, this Court reversed the judgment of the Supreme Court of Arkansas, which had held the rule unreasonable and had allowed penalties against appellant, for the reason that the penalty statute, Section 14261, was so construed as to deprive appellant of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U. S. 482, 35 S. Ct. 886, 59 L. Ed. 1419.

2. The court in its pretended exercise of legislative authority acted so as to deny due process to appellant.

The action of the Arkansas court in declaring the appellant's rule unreasonable deprived the appellant, in a strange way, of due process of law in the fixing of a rate for utility service.

The regulation of the rates of public utilities is a legislative process. The upsetting of the appellant's rule defining the amount of service to be provided for the established rate necessarily constitutes a rate order. Every rule affecting a rate is a part of the rate—and so specifically says the statute of Arkansas in its definition of "rate" (Sec. 2064 (e) Pope's Digest).

The legislative regulatory power in this day is customarily delegated to administrative commissions with provision for judicial review of the lawfulness of their orders by direct proceedings in the courts. This is the procedure established by the Arkansas Utilities Act (Act 324, Laws of 1935). The legislative power is delegated to the Department of Public Utilities, and the courts are invested with jurisdiction in a direct proceeding to determine whether the Department "has regularly pursued its authority". The statute (clearly enough, it would seem) does not delegate any legislative authority to the courts, but confines

their jurisdiction to a simple yea or nay answer to the question of the Department's order having been reached in accordance with its statutory authority.

The jurisdiction of the Department legislatively to determine the reasonableness of the appellant's rule was invoked some two years before the case at bar was brought, and, after hearing, the Department confirmed its reasonableness and ordered the rule enforced. Upon appeal, eventually reaching the Supreme Court of Arkansas, that court sustained the order of the Department as validly made in its legislative capacity. (*Ft. Smith* case, *supra.*) The court in that case was, however, not concerned with the reasonableness of the rule, since it had not been claimed that the Department exceeded its statutory authority to prescribe only reasonable rules.

Under the circumstances, in the case at bar, the action of the Supreme Court of Arkansas in adjudging the appellant's rule to be unreasonable effects a deprivation of appellant's property without due process of law contrary to the 14th Amendment in two ways:

(a) The court essays a legislative act, without any delegated authority so to act, and employs its judicial power of execution of its judgments to enforce its spurious legislative order. This procedure so offends the traditionally accepted concepts of the orderly processes of law as to constitute a taking without due process. Due process of law, in its simplest meaning, cannot embrace the unexpected promulgation of a legislative order by a judicial tribunal without delegated legislative authority, followed by the judicial execution of the legislative order against the property of the appellant.

(b) If it be assumed that the Supreme Court of Arkansas, by some non-existent statute, possesses legislative power to regulate utility rates, then the exercise of that power by the court in this case denies the appellant due process of law.

The appellant was afforded no notice of attack, even the forbidden collateral attack (*Texas, etc. R. Co.* v. *Abilene Cotton Oil Co.*, 240 U. S. 426, 51 L. Ed. 553) on the reasonableness of its rule, nor any hearing thereon. The Arkansas court in its own opinion (140 S. W. 2d 132, 134) conceded that the issue of reasonableness had not been tendered at the trial. And consequently, of course, no evidence of the reasonableness of the rule was offered. The Supreme Court of Arkansas, accordingly, annulled the appellant's rule, which had been held reasonable and ordered enforced by the valid order of the regulatory Department, without evidence, without notice, and without hearing. This action amounts to a clear contravention of the 14th Amendment under authority of:

*Chicago, etc. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970;

*San Diego Land Co.* v. *National City*, 174 U. S. 739, 43 L. Ed. 1154, (Ohio case—Cardozo opinion);

*West Ohio Gas Co.* v. *Comm.*, 294 U. S. 63, 79 L. Ed. 761;

*Ohio Bell Tele. Co.* v. *Comm.*, 301 U. S. 292, 81 L. Ed. 1093.

Without such opportunity for hearing, the appellant was unable to present its potential claims that the ultimate declaration of the unreasonableness of the rule would effect a taking of its property without due process of law by requiring the provision of free service to the non-customer classification:

*Northern Pac. R. Co.* v. *North Dakota*, 236 U. S. 585, 59 L. Ed. 735;

and by requiring the appellant to forsake its constitutional property right to establish itself reasonable classifications of service, and reasonable rates applicable thereto:

*Chicago, etc. R. Co.* v. *Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423.

3. The court's decision effects a taking of appellant's property without due process in any event.

In the contingency that it might sometime be contended that this case might be construed as having been decided on a non-Federal ground, namely, on the ground of a discriminatory application of a reasonable rule, the appellant considers it essential to emphasize that such could not possibly be the case. Except as the rule is declared unreasonable, the case would be governed by the decision of the Arkansas court in *Southwestern Tel. & Tel. Co.* v. *Sharp & White*, 118 Ark. 541, 177 S. W. 25, which is nowhere overruled in the opinion here, but which is indeed cited in this very opinion with approval.

In addition, if the decision of the Arkansas court should be considered from the assumption that the rule was declared reasonable, rather than unreasonable, the decision holding appellant liable for penalties, when appellant was enforcing a tariff rule which it had been ordered to enforce by the Arkansas Department of Public Utilities, places appellant in the anomalous and inequitable position where, if it complies with the order of the Department of Public Utilities, it becomes liable for the statutory penalty under Section 14261 of Pope's Digest, whereas, if it ignores the order of the Department of Public Utilities, in order to avoid penalties under Section 14261, it then becomes liable for penalties fixed by Sections 61 to 64 of the Public Utilities Act of Arkansas (Pope's Digest, Sections 2121 to 2124) for violation of the orders of said Department. Appellant is thus placed in a situation where it is liable for penalties whichever course it takes, with no way of escape. Under this decision, the compliance with one statute would produce the violation of another, with resulting penalties. Even if, (contrary to the record), appellant had violated the Utilities Act

in deliberately permitting some customers to receive service at less than tariff rates, appellant would not, in the opinion herein, be permitted to mend its ways and to comply with said Act in order to avoid penalties under Section 14261, *supra*. Thus appellant would be denied the equal protection of the laws and its property would be taken without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, in being compelled to multiply its criminal offenses under the Utilities Act.

The effect of the opinion and decision is to penalize appellant for enforcing an order of the State regulatory commission at the first place that it encounters a violation, on the ground that enforcement of the order might have been started elsewhere. Appellant is under the duty and has the right to comply with said order wherever it finds violations thereof, without liability for penalties under Section 14261, *supra*, and to violate its duty and take away appellant's right deprives appellant without due process of law and denies it the equal protection of the law.

The appellant is held liable for penalties in the face of the conceded fact that appellee was offered the service described at the only lawful rate, i. e., the filed tariff rate, but refused such a service. The opinion and decision thus holds that appellee, in order to recover penalties, does not have to comply with the reasonable rules and regulations of appellant, in spite of the fact that Section 14261, the penalty statute, makes such requirement of appellee before penalties can be recovered. Reading out of and nullifying the provision requiring compliance or offer to comply with the reasonable rules and regulations of the telephone company, interprets and construes the penalty statute, Sec. 14261, *supra*, so as to make it unreasonable, arbitrary and oppressive and causes it to operate to deprive appellant of its property without

due process of law and to deny to it the equal protection of the law.

Penalties were assessed against the appellant because the court found that other customers of appellant were violating their contracts with appellant and thereby violating the tariff rule which appellant sought to enforce against appellee. The rule, as are all tariff rules of appellant, is a part of appellant's contracts with its subscribers. There was no evidence that appellant knew of such violations by any customer until they so testified from the witness stand, but all the evidence pointed to the fact that appellant was vigorously and energetically enforcing the rule wherever violations came to its attention. In view of the fact that these violations occurring on the customer's premises were unknown to appellant, and since appellant was entitled to rely upon its customers to perform their contracts with appellant, for the court to hold appellant liable for penalties for discrimination for not permitting appellee to so violate the tariff rule is to interpret the penalty statute, Section 14261, *supra*, so as to deprive appellant of its property without due process of law and deny it the equal protection of the law. Under this interpretation of the penalty statute it is impossible for appellant to avoid penalties by reason of the derelictions of its customeres except by forsaking its right to establish reasonable classifications, reasonable rules and regulations, and reasonable rates. The imposition of either alternative deprives appellant of its property without due process of law.

Of necessity, under the foregoing circumstances, appellant raised the Federal questions in its petition for rehearing to the Supreme Court of the State of Arkansas, since no Federal questions appeared in the case until the decision of that court. The Federal questions were disposed of by

the *per curiam* opinion of June 3, 1940, denying the petition for rehearing.

The opinion of the Supreme Court of Arkansas is appended hereto.

Respectfully submitted,

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## EXHIBIT "A".

No. 234.

In the Supreme Court of Arkansas, April 8, 1940.

SOUTHWESTERN BELL TELE. CO.

*vs.*

LEE AND HANNA.

BAKER, *J.*:

The two cases as above styled have been combined for disposition of the appeals in one opinion. The general facts in each case are very similar; the defense raises the same general issues in both cases. Whatever distinguishing characteristics there may be will be set forth in our discussion. In each case the appellee filed suit to recover penalties, as provided for in section 14261 of Pope's Digest, each charging that there had been discrimination by the telephone company against the plaintiff in not rendering the same flat rate service by the installation of business telephones for which application had been made, as was rendered to other people or customers in like situation in the same community. Mrs. Lee was operating a cafeteria on the campus of the State University at Fayetteville. During the summer of 1938, in order to save expenses while there was no school in session she asked that her telephone be discontinued, or, she be given the vacation rate, which meant that the telephone be disconnected, but not be removed, and that during that vacation she would pay a half rate in order to retain the telephone she had been using and to keep her old or original telephone number. This arrangement, as we understand, would not in any way release her from her contractual obligation to keep the telephone, but was merely a convenient arrangement whereby she paid a half rate without any service at all, but which assured her immediate connection upon her return at the beginning or opening of the University. On September 7th, at school opening, she asked that the telephone be con-

nected and service be restored. The telephone company at that time refused to restore this service for the reason, it contended, there had been a new classification of telephone service; that the service that she had prior thereto in the use of her telephone, where it was then located, near her table or desk, or cashier's stand, was not then available at the old contract price of $3.50; but that such telephone, which was so located that students at the University who patronized her place of business might use it, would be put in service or operation again at a new rate of $10.50 per month. The company refused to connect up the telephone as then located without an agreement to pay that price. There was offered to her what was designated as a different class of service; that is to say, if she would permit the company to locate the telephone in her kitchen or conceal it under a counter, or put it in a show case, where it was not readily accessible for her patrons, the students, it would then be put in operation for the price of $3.50 per month, as the rental charge had been prior to her vacation. The telephone company says that she refused to agree to this. Her testimony was equally as positive that she did finally agree to this arrangement. She insisted, however, that she should have the same kind of service that she claims was rendered to other business houses or concerns in the city, at the flat rate of $3.50, where customers of subscribers for the telephone service might make use of the telephone when they desired to do so. The company relied upon a rule which was offered in evidence and which has been identified as Rule C:

"Use of Customer Service—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or persons residing in the customer's household, except as the use of the service may be extended to joint users. The Telephone Company has the right to refuse to install customer service or to permit such service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, cus-

tomer service may be installed, provided the instrument is so located that it is not accessible for public use."

Although Mrs. Lee agreed, according to her testimony, that she would abide by and conform to Rule C and, permit the installation of the telephone under a counter or in a show case, the managing employees of the appellant company, in addition to the requirements of the rule, then demanded of her that she refuse permission to the students or patrons of her place of business to use the telephone. They say the reason they refused then to install the telephone is that she quite frankly told these managing agents for the telephone company that she would not deny or refuse the use of the telephone to anyone who might request its use as located either under a counter or in the show case and for that reason only they did not install the telephone.

This is not the first time that we have seen this rule, but it is the first occasion on which the requirements of the rule and the reasonableness thereof have been presented for our consideration. City of Fort Smith *v.* Dept. of Public Utilities, 195 Ark. 513, 518.

After mentioning the rule and the power of the department to enforce rules, we said: "We are not now concerned with the reasonableness of said rule and do not so decide."

We are by no means forgetful that appellant has argued the issues upon this appeal solely upon matters of questions of fact, asserting and assuming as they apparently have a right to do so, under the record in this case, that because the reasonableness of the foregoing rule was not questioned by appellee, it may not properly be so considered in this litigation. This is so contended on account of the fact that both in the Lee case and in the Hanna case, counsel for the appellees have argued that the cases may be settled upon questions of fact duly presented without a consideration or determination on the part of this court of the reasonableness of the rule offered as a part of appellant's defense.

Ordinarily we would feel ourselves bound by such limitations as the plaintiffs themselves may have felt impelled to

recognize in the decision of any rights they may have asserted in any matter wherein those rights were purely personal or individual.

In this matter, however, there are more than individual rights involved. The telephone company is a public service utility, having a monopoly of the service it renders in Fayetteville, where these suits originated and whatever rules it may announce must be considered not as an all-controlling force, or to possess the nature of a statutory enactment, but as regulatory, merely, of the business of the corporation and that such regulation must be considered as coupled inseparably, always, with the public interests. Therefore, if rules are not reasonable they may not be regarded as enforcible, or as affecting the rights of those who deal with the telephone company.

In this first case there is a sharp issue of fact, settled by the verdict of the jury as against the contentions of the telephone company, its insistence being that Mrs. Lee refused every form of classified service that it tendered to her; that it offered to her the ordinary business phone at $3.50, to be secreted or hidden under a counter, or in a show case, or in a box or cabinet which the company would provide at its own expense. Such instrument was for the exclusive use of herself and members of her family and her organization; that she refused to accept this service. On the other hand she testified quite differently, and the jury accepted her contention, that she agreed to accept what is known to be the business telephone to be installed by the company at a place inconvenient for public use, but at some place near the cashier's stand, but refused to have it located in her kitchen, because of the fact that she had to remain at the stand and take care of the business and could not go to the kitchen or other parts of the building to answer the telephone without possible loss or interruption in her usual business transactions, or, unless she employed extra help in some respects in regard thereto. It is her contention that she misunderstood the arrangement whereby there was installed a telephone as she had had it prior to the summer vacation and that when she had determined that the price charged was $10.50 she immediately asked that it be re-

moved and the ordinary business phone be restored at $3.50 and that she offered to comply with the reasonable rules and regulations of the company, even including the requirement that the telephone be placed under a counter, in a show case, or in a compartment. The dispute in this regard is that the telephone company insists now that it was not installed because she did not agree or promise to refuse permission to students to use the telephone in a new location, though she did agree to conform with all reasonable rules and regulations of the company. No examination of the foregoing rule will disclose that she should act as a guard for the telephone company to prevent the use of the telephone, nor is there anything in this entire record presented to us upon this appeal indicating that there had ever been a grant of power to the agents of the telephone company to exact a promise from her, in addition to one to abide by the reasonable rules and regulations of the company, as a condition precedent to the establishment of a telephone in her place of business.

There is evidence on the other hand that there were other places of business in the city of Fayetteville, wherein business telephones were installed and freely used by the customers of the subscriber having the telephone. For instance, we are told that in the bookstore at the University, patronized by pupils, there was a telephone installed for their use and another near the working desk, or place of business of the owner for his individual use and that he paid for and the company accepted the monthly rentals for these two telephones.

There is evidence that other places of business, drug stores and other mercantile establishments had telephones accessible to their patrons and customers who would use them as might be convenient.

There was, no doubt, some telephones in use in the city of Fayetteville as were those in use at the bookstore, but, it is argued that such places have not yet been reached in the correction of such abuses by the enforcement of the rule above mentioned; that as new telephones were required and installed from and after the time of the adoption of the rule and its approval by the utilities commission, no tele-

hones had been installed except in compliance with the rule, nd it is further argued that because of the fact that some ubscribers violated the rule others were not justified in oing so. The company argues also that the telephone in he bookstore, however, is not one operating under like ituation as that demanded by Mrs. Lee, the distinctive haracteristic being that the bookstore had operated its elephones and paid for this service for a period of six or even years; that in some of the drugstores they had re- uired that the telephones should not be located in places uite so convenient to the public as they had been during he years prior thereto. The full facts when developed show, however, that the standard business telephone in the town of Fayetteville was a $3.50 telephone, such as Mrs. Lee had had prior to the time of her vacation, such as had been operated in the bookstore, as a typical example, and other places of business in the city, one of which was a filling station. It is argued most earnestly in this case that these were not customers who were in like situation as that of Mrs. Lee and who should have been dealt with as they were dealing with her. We have given full consideration to all matters that have been introduced upon the particular distinguishing characteristics which the appellant company has already presented by its somewhat voluminous briefs, also, by oral argument of counsel, and we have yet to find what amounts to a substantial difference in Mrs. Lee's cafe, where she had demanded a telephone and in the bookstore, or the filling station. It is argued, and we understand it to be true, that Mrs. Lee's best customers were the students at the State University. We now suggest that there has not been abstracted in either one of the cases one line of testimony showing what the practice of the students at the University is in the use of the telephones. There is no proof whether they may have put in as many as five calls a day or five hundred. There is no proof in the entire record that the use of these telephones by the students tended to any extent, or any degree, to reduce, impair, or otherwise to disorganize the telephone service, nor is there any proof that the free use of the telephone by any students added to the expense of the telephone company. In truth, if a presumption should be indulged it must be against such a con-

tention, for the reason that the telephone established in the bookstore was for the free use of the pupils and that there was no complaint made on account thereof, nor of any evil effects or consequences that may have followed the free use of the telephone by the pupils. It must have been available where it had been installed for that purpose in the bookstore, nor is there any evidence that the pupils used these telephones at any location to any greater extent with any more frequency, or any less propriety than they used the telephone in the drugstore or in the filling station.

We have considered these facts rather fully, giving full effect to the contentions made by the appellant and have come to the conclusion that the distinction of difference in the classification offered to Mrs. Lee or to Mr. Hanna, under the said facts must be determined from the undisputed testimony to be as follows:

The telephone company says three classes of service were offered to Mrs. Lee, but were not available to Mr. Hanna.

(1) A telephone so located all her customers could make use thereof where she desired to have it placed a price of $10.50 per month was demended.

This was the same telephone service that she had enjoyed prior to the vacation for which she had paid $3.50. This was the same telephone service available at the bookstore, put in for the free use of the pupils, for which there was a charge of $3.50. This was the same telephone service available at most of the stores and at business houses for $3.50 per month. So this service may be regarded as the standard service of that community, one for which they charged everybody except appellees $3.50 and for which they were wanting to charge appellee, Mrs. Lee, $10.50. The other classified service they offered her was the same kind of telephone, secreted in the showcase, under a counter, or in a compartment, furnished by the company. This then was a substandard service for which they desired to charge this appellee $3.50. The other was a coin box service which could be operated only by the deposit of 5¢ for each call. The owner of the place of business and the subscriber to this telephone had to guarantee a rate substantially the same as

for the standard service, but he might get back as commission 20% over and above $3.30, the amount of the guarantee. As explained this coin box service was a kind of pay-call service, by which each person desiring to use the telephone paid to the telephone company for each call when made; and, the owner of the place of business, where it is installed furnished a place for installation, rent free. These were essentially the facts in the Lee case.

We shall proceed now to state any particular facts relating solely to the Hanna case before stating our conclusions.

At the time the Hanna case was tried appellant's witnesses testified that when they were negotiating with Mr. Hanna he had a coin box instrument or telephone in his place of business. He ordered it removed and this was on the last day it was in use. The agents for the telephone company testified that they offered to leave this telephone instrument in the place of business, upon the subscriber's guarantee of 11¢ a day, with further agreement that any amount received over $3.30 would be subject to a commission of 20%, to be paid to the subscriber, but this was not satisfactory to Mr. Hanna. Mr. Jaggers, who says he was the commercial representative of the telephone company, stated "the $10.50 rate wasn't available at that time, but every available service was offered to the plaintiff". He was offered a coin box telephone or a flat rate telephone where it wasn't accessible to the public, but ordered the coin box telephone removed on that day, May 4th. At that time it must appear, therefore, that the telephone company had only two alleged types of service which it could offer to its customers, the one was the so-called coin box type, which cost 5¢ for each call made over it, and the other was the ordinary, conventional, regulation, or standard type, then in use in all business houses in the city, but the service which the company insisted upon impairing so as to make it less convenient for the public, and, of course, more inconvenient for the subscriber, if he accepted that type of service, and no choice was left to him, in that regard, for he must either take the coin box machine or the impaired standard service. The regulation or standard type service at three times the regular price, $10.50, had not then been conceived.

In appellant's briefs, the arguments stand out that the defendant distinguished the types of service rendered by the amounts paid therefor, and what had been and was the usual type of service, the kind that had been in use prior to that date as a kind of standard or convential, or regulation on service as had always been tendered to, and was used by all business houses was still in common or ordinary use, some businesses having as many as two telephones put in, one out in the open, easily accessible to the public, located and put in by the telephone company for the use of the public, established and paid for by the business houses. At the time of the trial many of these were still in use and operation, just as they had been for a number of years, and the principal distinguishing differences as between these so long in use and the kind demanded by Mrs. Lee and by Mr. Hanna was that those already in use had been there many years. The price for all of these was and had been for a long time $3.50 per month. Notwithstanding the fact that this was a recognized standard service, what was offered to the appellee was the use of exactly the same kind of appliance with exactly the same facilities as was employed in other places of business, a notable example of which was the bookstore, and notwithstanding the fact that the price had never been over and above $3.50, this same service was not extended to Mrs. Lee, except upon a contract for the payment of $10.50 therefor. The telephone company refused to restore this standard service for Mrs. Lee or for Hanna who were both engaged in the restaurant business and who were patronized by students from the State University, unless these two subscribers who were demanding service would permit the telephone instruments to be installed in the kitchen or under a counter, or in a showcase or some place where it was inconvenient for the use of the public and in each of these instances inconvenient for the use of those who desired the service. The agents for the telephone company by their evidence argued that the standard type of service, when installed is for the sole use of the subscriber, whom they call a customer, and the members of his family and his employees, or members of the business organization. They argue also that if such customer permits

someone else to use the telephone he violates a contract made for the installation of the instrument. Such is the contention of the appellant company and because that condition was not upheld by the trial court, the appeal in these two cases is for the purpose of setting aside and overturning the judgments of the trial court. If under all the circumstances the contention is reasonable, based on a fair and natural classification of those who subscribed for and used telephones, we think it becomes our duty to uphold such contention as an established rule of the company, but, if, on the other hand, the distinction or so-called classification is artificial, arbitrary and without any sound basis in fact, the law will not support it.

In the presentation of our conclusions reached upon a full consideration of all the matters presented in this record, we say by way of premise, that not one line of testimony has been abstracted showing that telephones located in any place accessible to the students of the University has been subjected to any excessive use, not even the one located in the bookstore at the University, nor is there a word of testimony that a great number of calls over the telephone system would cost the telephone company any more than a few or half dozen calls in the same length of time, nor is there a word of proof that even though the students at the University made frequent and constant use of the telephones that may have been so installed for their exclusive use, such use has impaired to any extent the uses of services demanded by others from the same utility. Therefore, we think that the contention of the telephone company and its local agents that each telephone is located for the sole and exclusive use of the subscriber, the members of his family, and his employees, unreasonable, inasmuch as it fails to give consideration to the physical properties or mechanics of the telephone as well as the usual and ordinary controlling purpose of those who install such instruments in their places of business. Telephones are not like typewriters or cash registers in a place of business, used only by those engaged there. Telephonic instruments belong to the utility and they are installed for regular monthly rentals or charges, and the full monthly rentals are charged and paid

ordinarily without any deduction for "timeout" or "bad order". This fact is mentioned because the telephone is a two-way appliance, a means of communication between two people widely, or actually separated from each other. The purpose is to furnish immediate contact, whether the parties are separated merely by a block or so or by a greater distance of a mile or more. It is presumed to be an open channel of communication every minute of the day and hundreds of calls would not consume or use up any part of it, nor would this great number of calls tend to impair in the least the service.

Another interesting phase of telephone technique is wholly ignored by these agents of the telephone company and yet it is a factor upon which, to a great extent, the business of the telephone company must rely for its support. All that has been argued here as a reason for the rule, is customer's service. A fine example of that would be in a home where a mother cares for several small children. She desires and demands a telephone so that she can call the doctor immediately, if needed, and also that she may do her shopping without leaving her children unattended, but the doctor she calls, or the grocer, or the meat market, or the milkman had their telephones installed, not for the calls they might want to make, but rather for the reason that they might receive the calls of those who desire their wares. We do not know what degree or percentage of people who install telephones do so, so that their customers might be able to call them, but we venture to say a very large percentage of them do. While merchants and other businesses sometimes use telephones to call people in the transaction of business their controlling idea is to accommodate those who patronize them and to furnish to their customers an immediate means of communication so that they may profit by sales of their goods, wares and merchandise; so, it must appear that any limitation upon calls made over the telephone system is a limitation upon the service paid for by the ordinary business man who has installed the telephone to receive calls from those who want to buy his merchandise or by the doctor who wants his patients to be able to contact him immediately.

We think it must appear, therefore, that the agents of the telephone company who sought so assiduously to avoid rendering a free service to the University students are denying to a large number of subscribers or patrons of the telephone company the right to receive calls no doubt contemplated. No University student ever put in a call, even though unauthorized by the customer subscribing for the telephone, without at the same time calling a number paid for by another customer and whose telephone was perhaps installed for the very purpose of receiving such communications.

So it must appear, we think, that the classification intended to be made by the telephone company, or its agents, is without a sound basis, in fact or reason, and instead of rendering to new subscribers the same standard service that has been tendered to others and which each of these appellee subscribers has heretofore received for the price of $3.50 a month, and now to refuse that service except upon the payment of three times that sum, $10.50, is an unwarranted, unjust and unfair discrimination; or, on the other hand, so to impair that service by placing the telephone in the kitchen, or under a counter, or in a showcase, as to make it inconvenient to reach, and inaccessible, except by added trouble, and so to reduce what has heretofore been a standard, conventional or regulation service, and on account of that inferior and defective service charge, what is regularly charged to all other business enterprises for a service not so hampered or impaired, must also appear to be a discrimination. Appellant company has cited for our consideration the case of Southwestern Tel. & Tel. Co. *v.* Sharp and White, 118 Ark. 541, 177 S. W. 25, as authority in this case. We accept the announcements made in that case which are to the effect that the telephone company has the right to make all reasonable rules and regulations for the operation and control of its business, and those who deal with it must comply with such reasonable rules and regulations, but this announcement may not be taken as an unlimited authority on the part of the telephone company to announce a rule, the effect of which would result in reducing, impairing, or rendering an inferior service with the same appliances and facilities used

in rendering the standard or regular service, and thereby defeat the effect of regulatory statutes. The public has the right to demand and receive the best available service and no public utility has the right to choose, arbitrarily, to render an inferior service, or a sub-standard service merely to inconvenience those from whom they are unable to exact potential fees or charges that might otherwise be collected. It is possibly true, we do not know, that the student body at the State University is a potential source of revenue to the telephone company, if it could so regulate its business affairs that it would be able to collect from those who temporarily reside in University quarters, but that fact furnishes no basis or reason to deny an equally efficient service to those engaged in business there, because their principal customers are students of the University, nor may they require such business people to collect from the students the potential income they are otherwise unable to get by usual and approved methods of dealing.

It is argued that the book seller, or the filling station operator is not one in like situation with either of the appellees in this case. It is true that perhaps no two places of business in the city of Fayetteville are identical in all respects and that if the term "in like situation" be pursued to an ultimate conclusion, then every business house in the city of Fayetteville would form a separate and distinctive class. The statute intended no such specious reasoning. The organization operating the telephone system in Fayetteville must not be forgetful of the fact that the State University is the city's greatest institution; that without it few telephones would be in use and that those who now pay their regular monthly sums for the maintenance and support of this telephone system would no longer need to do so.

This is not the first occasion upon which we have given consideration to the rights of the subscriber or user of the telephone in his relation to other subscribers or users. Indeed, in a recent case the principal complaint was that the plaintiff was the object of a discrimination in that he was denied the use of some of the facilities of the telephone company, though he was given the right to a physical connection or right to make calls over the telephone system. After having copied in full Sec. 14261 of Pope's Digest, we said:

"It does not answer the requirements of the law, we think, merely to extend to one who has applied for service, telephone connection only. The telephone company has made us conscious of the facilities within its control of directory value and proper listing of subscribers, not according to consecutive numbers, but by an alphabetical arrangement of names, so that any particular person or business concern, among all of the subscribers or users of telephone service, may be promptly reached without undue trouble or delay." S. W. Bell Tel. Co. *v.* Matlock, 195 Ark. 159, 111 S. W. 2d 500.

Other remarks in the same opinion no less pertinent we think deny the right to anyone who recognizes the telephone as an instrument whereby the subscriber or customer may be reached or called rather than one for his exclusive use in calling other persons. In truth, we held in that case that discrimination might consist in a refusal to list in the directory one who made proper application therefor, provided that one was willing to abide by reasonable rules and regulations of the company.

Such was the decision of this court in the Yancy case. In that case, although Mr. Yancy had a residence telephone, he was required to go to the central office of the exchange and pay cash in advance before it would permit him to use long distance communication. It was also held in that same case that the telephone company could exact pay in advance as was decided in the Sharp and White case, supra. Yancy *v.* Batesville Tel. Co., 81 Ark. 486, 99 S. W. 679.

So the discrimination determined in that case consisted in failing to render to Yancy the same service available to others, a discrimination in quality or kind of service, but not because of any effort to make sure of payment therefor.

In the cases discussed, as in this opinion so far, we have given due emphasis to the fact that the customer or subscriber for service must evince a willingness to conform to or abide by the reasonable regulations or rules of the company. In this regard we call attention to two matters. The rule in this case was one that was promulgated by the company, though the appellant argues that it is a rule of Department of Public Utilities. There were rules and regulations promulgated by such utility corporations before such commissions were functioning and these were no less

binding than the ones promulgated at the present time, even after the approval of the commission. S. W. Tel. & Tel. Co. *v.* Sharp and White, supra; Yancy *v.* Batesville Tel. Co., supra.

The point we now make is that such regulations may not be ignored but must be observed by the corporation proclaiming them. The corporation certainly may not ignore such rules as to some customers and observe them as to others. If any rule may be so enforced, then the telephone company has the power to abrogate and nullify statutes intended to prevent discrimination. Certainly, if the telephone company elects to enforce a rule, there arises at once a discrimination as between those who already have it and the new subscriber or applicant.

There is little force in the argument offered in defense that the company may not be able to change all telephones immediately but a reasonable time must be given within which the changes will be made as they are reached in the usual and ordinary course of business. However reasonable the argument may sound, it violates well known practical operations of all telephone companies. Most of us have seen storms break down telephone lines, sleet and ice almost totally disrupt the service, yet within a few days the entire system be reworked and restored reasonably to ordinary capacity. In truth, the evidence in this case shows that the two businesses are the only ones who have been denied service, not solely because they refused to abide by the rules, but because the telephone company exacted more of them than the rules required,—express promises that they actively seek to prevent the use of the telephone by any non-subscriber. Such was the declaration of the witnesses in the Lee case, and surely no other conclusion can be reached from the proof.

In the Hanna case the telephone company had determined that Hanna should continue in the use of the coin box instrument. It had not then conceived the idea of a triple charge for the standard business telephone installed at a place selected by the customer or subscriber. There is no proof of another instance like this in the city of Fayetteville.

In a recent case we held that a telephone company might not make unreasonable requirements as a condition precedent to the rendition of the service. Southeast Ark. Tel. Co. *v.* Allen, 191 Ark. 520, 524. We said therein: "Appellee offered to comply with this rule. He says he was prevented from doing so by a requirement that he surrender his right to sue for penalties accruing to him by reason of alleged discrimination. The telephone company did not have a right to require him to yield or surrender any claim for penalties or a condition upon which it would render him the service."

There is some evidence that in a few instances the telephone company has by permission, moved some instruments and placed them in showcases or under counters, but there are other instances wherein there is the patent disregard by the company for the alleged rule in that there is the establishment and maintenance of telephones for public use in many business houses.

Besides the fact we think appellant's classification is arbitrary and artificial, we also hold that any interpretation of the rules adopted which permits discriminations or apparently furnishes an excuse therefor by way of defense is in violation of the appropriate statute. Section 14261 of Pope's Digest.

It follows that the judgments in both cases should be affirmed. It is so ordered.

Smith and McHaney, JJ., dissent.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation,
Appellant,
v.
CARRIE C. LEE,
Appellee.
No. 299.

## APPELLANT'S BRIEF
## IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF THE JURISDICTION OF THIS COURT.

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IN THE

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SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation,
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Appellee.

No. .....

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## APPELLANT'S BRIEF
### IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF THE JURISDICTION OF THIS COURT.

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### I. THE HISTORICAL ORIGIN OF THIS CASE.

In running its telephone business in Arkansas, the appellant (which will hereafter often be called the company) makes its services available at all its exchanges for the payment of a flat monthly charge. As in all other pricing systems the appellant found need for defining the quantity of service that would be provided for the flat rate.

The amount of service that the appellant offers to give for the flat price is defined (as the Arkansas Utilities Act requires) by a rule and regulation filed with the Department of Public Utilities, as the regulatory commission is there called. The particular rule that accomplishes this essential purpose in this instance is known as paragraph V-C of the section on "Rules and Regulations Applying to All Subscribers' Contracts" in the appellant's "General Exchange Tariff" filed with the Department in obedience to the statutory injunction. This paragraph reads:

> "USE OF CUSTOMER SERVICE—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or persons residing in the customer's household, except as the use of the service may be extended to joint users. The Telephone Company has the right to refuse to install customer service or to permit such service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the instrument is so located that it is not accessible for public use."

This rule, it may be noted, in reality is comprised of two rules. The first confines the use of the service to be furnished for the flat rate to the customer, his family, his employees and business associates; the second provides a practical means by which the company may reasonably assure itself that the use of the service is so confined. In a sense the second part of the rule, permitting the company to locate the flat rate telephones in places inaccessible to the public generally, is superfluous, although it has been found helpful by the company in dealings with its customers. The restriction of the service to the specified

users is the true rule, and if the company is persuaded that the customer will in fact observe the restriction, and is constantly in position to prevent the unauthorized use of the service, then no occasion would exist for requiring an inaccessible location of the instrument. On the other hand, a compliance with the company's request for an inaccessible location would in no sense constitute a compliance with the essential rule of confinement of use. A customer might well make an inaccessible installation of a telephone in a back room and then flagrantly violate the company's tariff rule by a general invitation of the public to feel free to make unlimited use of the concealed telephone.

The need for this rule defining the amount of service that will be given for the flat rate is adequately, though perhaps not fully, explained in the report and order of the Department of Public Utilities incorporated in this record (Tr. II, 19-32).

While the company recognizes, of course, that variations of use will occur between different customers, by the inevitable functioning of averages, the company rather certainly knows what it is selling for the flat rate when the rule of paragraph V-C is applied. The variations are inherent in the flat rate system which up to now has been found to be the most desirable for the appellant's telephone system throughout five states. The rule, however, establishes a limit to the variations which in its absence would be greater.

The flat rates in the telephone business are in the same category as the pricing systems exemplified by "all you can eat for 50 cents," or "all the lemonade you can drink for a nickel." In each case the "you" means one person—not the whole world or any collective part of it. The same would be true as to flat rates for water. Mr. Jones contracts with the water company for water supply at his home at the fixed rate of $2.00 per month. With Mr. Jones'

permission, his next-door neighbor, Mr. Brown, connects his hose to Mr. Jones' hydrant, and makes use of all the water he wants. Of course, the water company would not be expected to continue to supply at the flat rate of $2.00 per month all the water used by both. And so it is in the telephone business—hence the rule.

Now the company has long known that some of its customers in trade, such as the plaintiff, wanted to have a telephone that their own customers or passersby might use, and the company has also wanted to make some provision for the telephone needs of those who have no regular service and those who are on the streets. In order to meet this demand, the company provides what it calls semi-public service, the use of which is not affected by the rule of confinement, V-C. The traditional semi-public service is the familiar coin-box service—measured service —which is paid for as it is used—by the public or by the customer, as the case may be, at a nickel a call. In Fayetteville, however, where this case originated, an additional, and somewhat unusual, form of semi-public service is offered. It is furnished at the filed tariff flat rate of $7.00 a month ($10.50, at the time of the origin of this case) as compared with the flat rate for customer service, to which the rule applies, of $3.50 a month. This semi-public flat rate has the effect of withdrawing the rule of confinement in return for the larger stipend. In that kind of service the subscriber is at liberty to have his instrument located anywhere, and to permit unlimited use of the service by anyone who happens in. The desire for this type of service seems to be based on some notion that it possesses advertising value—that it fetches in trade or potential trade.

The difficulties of enforcing this rule, with the infractions occurring on the customer's premises, are obvious, of course, and for some time the company was somewhat

neglectful of its enforcement. Several years ago, however, enforcement activities were renewed, and resistance was encountered in some quarters owing, as the company believes, to a lack of understanding of the need for the rule. This unpopularity eventually resulted in the passage of an ordinance (under the dual form of regulation obtaining in Arkansas) having the effect of doing away with the rule at Fort Smith. This ordinance was taken by the company before the Department of Public Utilities for review under the statutory procedure, and after hearing the Department ordered the company to reinstate the rule and to enforce it vigorously throughout the state (Tr. II, 19-32). Upon appeal ultimately to the Supreme Court of Arkansas, the Department's order was declared to have been validly made within the Department's statutory authority (**City of Fort Smith v. Department of Public Utilities**, 195 Ark. 513, 113 S. W. [2d] 100).

The company's efforts to enforce the rule at Fayetteville in obedience to the Department's order resulted in another ordinance—this time to the effect that service of the semi-public character must be given at a flat rate, rather than a measured rate, if the customer insisted upon it. The company thereupon established a charge for this type of service—flat rate semi-public service—and filed its schedules containing the new rate with the Department, as the statute requires.

So much for the history leading up to this case which the appellant believes should contribute to a full understanding.

## II. THE NATURE OF THIS CASE.

The plaintiff asked the appellant to furnish her with telephone service at her eating house on the campus of Arkansas University at Fayetteville. She wanted to pay the usual flat rate for customer service, but she advised

the company, upon its inquiry, that she would permit, and would not refuse, the use of her service by her patrons and other visitors at her place of business (Tr. II, 4a, 5, 7). She refused, in other words, to comply with the appellant's rule applying to customer service, and in doing so the effect of her request was for semi-public service, to which the rule does not apply, at the lower rate for customer service. The company refused this request, and the plaintiff went without telephone service when she rejected the offers of other types of service at the established tariff rates.

The plaintiff then brought this lawsuit to recover the penalties provided by section 14261 of Pope's Digest of the laws of Arkansas, reading:

> "DISCRIMINATION—PENALTY. Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities, without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are (is) not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars and five dollars per day for each day from the expiration of such notice until said demand is complied with or suit is instituted for failure to comply with such demand, for such discrimination, after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused * * *."

The plaintiff contended that a discrimination was practiced against her by the company's refusal to give her the service she wanted, at the rate she wanted to pay, because other customers of the company were receiving such a service at such a rate. Her contention, of course, was the equivalent of a contention that she should not be held to a compliance with the rule because she could produce some other customers of the appellant who were violating the rule, and who were, ipso facto, violating their contracts with the company.

The penalties of the statute were assessed against the appellant for its refusal to meet the plaintiff's demand, although the appellant was actually obliged by law to do as it did. In common with all other regulatory acts that the appellant knows anything about, the Arkansas Utilities Act requires all rates, and all rules and regulations affecting the rates, to be filed with the Department of Public Utilities, and under the pains of the penalities elsewhere provided in the act, requires that the rates so filed shall not be departed from. The appellant, accordingly, had no alternative but to charge the $10.50 flat rate which it had on file with the Department in its tariff for the semi-public service which the plaintiff was demanding. Furthermore, under the provisions of the Utilities Act the appellant was not at liberty to disregard the order of the Department requiring it to enforce its rule confining the use of customer service.

All through the case, at every stage, the plaintiff readily acknowledged that the reasonableness of the rule was not under attack, and with a welcomed frankness her counsel repeat this acknowledgment in their statement opposing the jurisdiction of this court (p. 4). It is not surprising, therefore, that no evidence concerning the reasonableness of the rule was presented at the trial. The plaintiff apparently agreed, in the appellant's opinion, that under the

statutes of Arkansas the reasonableness of the rule was not subject to collateral attack.

But in spite of the absence of any issue respecting the subject between the parties, and in spite of the absence of any evidence, the supreme court gave its attention to the rule and declared it unreasonable and unenforceable, and by a divided court affirmed a judgment for penalties for that very reason. Such an unprecedented action is so much at odds with the accepted notions of fair play that it is bound to be offensive to the Fourteenth Amendment to the federal Constitution—and this result comes about in the ways we shall now undertake to demonstrate.

## III. THE CONSTITUTIONAL QUESTIONS IN THIS CASE UNDER AN ADJUDICATION OF UNREASONABLENESS OF THE RULE.

### 1. The Denial of Due Process in a Legislative Proceeding.

From beginning to end the opinion and decision of the Arkansas court operate to take the appellant's property and to deny due process of law to the appellant. Indeed, even the court's approach to the problem so operates contrary to the Constitution; and this subject is as good a one as any to begin with, even though it may not furnish the most shocking example of the unconstitutional hardships imposed upon the appellant. Briefly, the court approached a solution of the case by way of performing a legislative act, not a judicial act—by declaring the appellant's rule unreasonable—and by thus issuing an order establishing a future rate for a public utility service. Under the circumstances of this case, and upon a consideration of the statutes of Arkansas, this action of the court denies the appellant due process of law.

The regulation of the rates of public utilities is a legis-

native function, even when performed by the courts (**Southwestern Bell Telephone Company v. Oklahoma**, 303 U. S. 206; **Prentis v. Atl. Coast Line Ry. Co.**, 211 U. S. 210). The court's decision that the appellant's rule, V-C, defining the amount of service to be provided for the established rate, was unreasonable (and therefore unenforceable) necessarily constituted a rate order. Every rule affecting a rate would appear inevitably to be a part of the rate, and surely the rule here concerned was a part of the rate. The rule designated the class of persons—the customer, his family, and business associates—who were entitled to receive the customer service for the applicable customer rate. In declaring the rule unreasonable, the court enlarged to infinity the class of persons who might employ the service, and thus increased the amount of service which must be given for the same rate. The enlargement of the service that must be provided for any given rate is the precise equivalent of the reduction of the rate for any given service. Furthermore, by rubbing out the application of the rule to customer service, the court automatically reduces the appellant's flat rate for semi-public service down to the lower customer rate. The applicability of the rule to the customer service and not to the semi-public service is the only distinction between the two classes of service.

The Arkansas statute, in its definition of a "rate" also recognizes that a rule affecting a rate is a part of the rate.

> "The term 'rate' when used in this Act, means and includes every compensation, charge, fare, toll, rental and classification or any of them, demanded, observed, charged or collected by any public utility for any service, products, or commodity offered by it as such public utility to the public, **and any rules, regulations, practices or contracts** affecting any such compensation, charge, fare, toll, rental, or classification" [Pope's Digest, section 2064 (e)].

The legislative regulatory power nowadays is customarily delegated to administrative commissions with provision for judicial review of the lawfulness of their orders by direct proceedings in the courts. This is the procedure established by the Arkansas Utilities Act (Pope's Digest, section 2064 et seq.). The legislative power is delegated to the Department of Public Utilities, and the courts are invested with jurisdiction in a direct proceeding to determine whether the Department "has regularly pursued its authority" [section 2097 (d)]. The statute (clearly enough, it would seem) does not delegate any legislative authority to the courts, but confines their jurisdiction to a simple yea or nay answer to the question of the Department's order having been reached in accordance with its statutory authority.

As we have said earlier, the jurisdiction of the Department legislatively to determine the reasonableness of the appellant's rule was invoked some two years before the case at bar was brought, and, after hearing, the Department confirmed its reasonableness and ordered the rule enforced. Upon appeal, eventually reaching the Supreme Court of Arkansas, that court sustained the order of the Department as validly made in its legislative capacity. City of Fort Smith case, supra. The court in that case, however, was not concerned with the reasonableness of the rule. The appellant there contended only that the Department had no authority whatever in the premises to issue any order, and did not contend that the order which was issued was unreasonable and therefore beyond the Department's statutory authority, which is limited to the prescription of such rules only as are reasonable.

Under the circumstances, in the case at bar, the action of the Supreme Court of Arkansas in adjudging the appellant's rule to be unreasonable effects a deprivation of appellant's property without due process of law contrary to the Fourteenth Amendment in each of two ways:

(1) There is no statute in Arkansas empowering the court to act legislatively, as we have demonstrated the court did act. The Assembly has never delegated any such authority to the court; and indeed it would appear to have been prevented from doing so by Article IV, section 1 of the Constitution of Arkansas, pertaining to the separation of powers. Despite, then, the want of any delegation of legislative authority, the court essays a legislative act, dubs it a judgment, and employs its judicial power of execution of its judgments to enforce its spurious legislative order. This procedure so offends the traditional concepts of the orderly processes of law as to constitute a taking without due process. Due process of law, in its simplest meaning, cannot embrace the unexpected promulgation of a legislative order by a judicial tribunal without delegated authority, followed by the judicial execution of the legislative order against the property of the appellant.

(2) If it be assumed that the Supreme Court of Arkansas, by some undiscoverable statute, does possess legislative power to regulate ultility rates, then the manner of the exercise of that power by the court in this case also denies the appellant due process of law. The appellant was afforded no notice of attack, even the forbidden collateral attack (**Texas etc. R. Co. v. Abilene Cotton Oil Co.**, 240 U. S. 426), on the reasonableness of its rule, and was afforded no hearing thereon. The Arkansas court in its own opinion (140 S. W. [2d] 134 l. c.) conceded that the issue of reasonableness had not been tendered at the trial. The court said:

> "We are by no means forgetful that appellant has argued the issues upon this appeal solely upon matters or questions of fact, asserting and assuming as they apparently have a right so to do, under the record in this case, that because the reasonableness

of the foregoing rule was not questioned by appellee, it may not properly be so considered in this litigation. This is so contended on account of the fact that both in the Lee case and in the Hanna case, counsel for the appellees have argued that the cases may be settled upon questions of fact duly presented without a consideration or determination on the part of this court of the reasonableness of the rule offered as a part of appellant's defense.

"Ordinarily we would feel ourselves bound by such limitations as the plaintiffs themselves may have felt impelled to recognize in the decision of any rights they may have asserted in any matter wherein those rights were purely personal or individual.

"In this matter, however, there are more than individual rights involved. The telephone company is a public service utility, having a monopoly of the service it renders in Fayetteville, where these suits originated, and whatever rules it may announce must be considered not as an all-controlling force, or to possess the nature of a statutory enactment, but as regulatory, merely, of the business of the corporation, and that such regulation must be considered as coupled inseparably, always, with the public interest. Therefore, if rules are not reasonable they may not be regarded as enforcible or as affecting the rights of those who deal with the telephone company."

The plaintiff also, with consistent frankness, even through her motion to dismiss here, has concurred in the appellant's charge that the issue of reasonableness was never raised.

Consequently, of course, no evidence of the reasonableness of the rule was ever offered, and none was before the court when it surprisingly concluded that the rule was unreasonable and that more service ought to be given for the rate that was established to apply to a restricted service.

The Supreme Court of Arkansas, accordingly, without

notice, without hearing, and without evidence, annulled the appellant's rule, which had been held reasonable and ordered enforced by the valid order of the regulatory Department. If any statute had ever authorized such an action, that statute would be void as in contravention of the Fourteenth Amendment, and a fortiori such an action without the support of delegated authority possesses the same vice in an aggravated degree.

Due process requires notice, and hearing, and evidence in the legislative, regulatory process.

**Chicago etc. R. Co. v. Minnesota**, 134 U. S. 418;
**San Diego Land Co. v. National City**, 174 U. S. 739;
**West Ohio Gas Co. v. Comm.**, 294 U. S. 63;
**Ohio Bell Teleph. Co. v. Comm.**, 301 U. S. 292.

### 2. The Denial of Due Process in a Judicial Proceeding.

Even if the action of the Arkansas court in declaring the rule unreasonable could in some way be regarded as a judicial, rather than a legislative act, the denial of due process is simply converted from a legislative denial to the equally forbidden judicial denial. The rights guaranteed by the Constitution are as much protected against a taking by an erratic judicial process as by a legislative process. (See **Abbott v. Tacoma Bank of Commerce**, 175 U. S. 409, in which it is said, "It is true • • • that a state may not by any of its agencies, legislative, judicial, or executive, disregard the prohibitions of that amendment"—and the cases hereafter cited.)

Notice and hearing, which were here lacking on the issue of reasonableness of the rule, are as essential in the judicial process as in the delegated legislative process which we have discussed above. (See **American Land Co. v. Zeiss**, 219 U. S. 47; **Twining v. New Jersey**, 211 U. S. 78).

Evidence, also, to support the conclusion reached is

both wholly essential and wholly lacking (**Carlson v. Washington,** 234 U. S. 103, 223 U. S. 573; **Cedar Rapids Gas Light Co. v. Cedar Rapids,** 223 U. S. 655; **Southern Pac. R. Co. v. Schuyler,** 227 U. S. 601; **Fiske v. Kansas,** 274 U. S. 380).

### 3. The Denial of Due Process in Penalizing Under One Statute for Conduct Required by Another.

Perhaps the most shockingly unconstitutional result of the declaration of unreasonableness of the rule is the imposition of penalties against the appellant under one statute because of the compliance with another.

The very conduct of the appellant which the court, through declaring the rule unreasonable, has used as the excuse for inflicting penalties upon the appellant was actually twice enjoined upon the appellant by the Utilities Act—and in no uncertain terms.

As we have said in our preliminary explanation of this case, the appellant had incorporated its rate of $10.50 for flat rate semi-public service in its tariffs for Fayetteville which were filed with the Department of Public Utilities, as the statute requires, and which were received in evidence in this case. When the plaintiff declined to confine the use of the service she was requesting in accordance with the rule applying to customer service, her demand was necessarily converted into one for the semi-public class of service to which the rule does not apply. Under the Utilities Act the appellant, in these circumstances, was not at liberty to do anything other than it did; namely, to refuse the demand for semi-public service at the $3.50 rate for customer service, and to offer the service at the applicable semi-public rate of $10.50 contained in the filed tariff, which was in turn refused by the plaintiff.

The section of the Utilities Act requiring this behavior of the appellant reads:

"No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect or receive, from any person, a greater or less compensation for any service rendered, or to be rendered by such public utility, than that prescribed in the schedules of such public utility, applicable thereto then filed in the manner provided in this Act, nor shall any person receive or accept any service from a public utlity for a compensation greater or less than that prescribed in such schedules" (Pope's Digest, section 2075).

Furthermore, as we have also said before, the appellant was obliged to apply its rule by an existing formal order of the Department which the Arkansas Court in the Fort Smith case had already held to have been validly promulgated within the Department's proper authority. This order has never been set aside to this day, and it probably never will be if the court ever gives its attention to the evidence justifying the rule which may some day be before it, but which was not in this case.

The consequences, then, of a compliance by the appellant with the plaintiff's demand for service would have been a two-fold violation of Utilities Act—a violation of the statute forbidding any departure from the filed tariff rates, and a violation of the Department's order which the appellant was bound to obey. Both of these violations would have subjected the appellant to the criminal penalties of the Utilities Act which are imposed by Pope's Digest, section 2121, as follows:

"(b) Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty

of not less than $100 nor more than $1,000 for
such offense."

The due process clause, of course, with its more ex
meaning of fundamental justice and its simpler mea
of fair play, can never tolerate a situation where pena
are imposed under one statute because of conduct requ
by another. That is the appellant's anomalous and i
tricable situation in this case. It elected to comply
the Utilities Act, and for doing so, it was thereupon
ished under the penalty statute. If it had elected to a
the latter result, it would have become immediately
ject to the punishments of the Utilities Act.

This case is more incongruous, more aggravated,
far harsher in result (largely owing to the presence
of the Utilities Act) than the earlier case under the Ar
sas penalty statute which this court reversed for unco
tutionality by a unanimous decision. Otherwise the
cases are virtually dead parallels. In **Southwe**
**Tel. and Tel. Co. v. Danaher**, 238 U. S. 482, appellant
enforcing a rule that applicants for new service sh
pay for service rendered in the past before the new se
was connected. In a suit for penalties under the p
cessor of Pope's Digest, Sec. 14261, arising out of
enforcement of this rule by the telephone company,
rule was held unreasonable by the Arkansas Court (**So**
**western Tel. & Tel. Co. v. Danaher**, 102 Ark. 547, 144 S
925), and penalties were allowed against the telep
company. The telephone company thereupon appeale
the United States Supreme Court on the ground th
Federal question was involved, since the constru
placed upon the penalty statute by the Arkansas c
was in conflict with the due process clause of the F
teenth Amendment to the Constitution of the U
States, because the company was penalized for enfo
a rule which it had every reason to think was reason

In a unanimous opinion reversing the judgment of the Arkansas Court, this Court said:

> "Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine whether the application made of the statute in that instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve. What, then, are the circumstances in the light of which this question must be determined?
>
> "Regulations like that which the telephone company applied to the plaintiff were not declared unreasonable by the statute. It left that matter entirely open and to be determined according to general principles of law. The state court did not hold otherwise. The regulation, according to the rejected proof, was adopted in good faith, had been uniformly and impartially enforced for many years, and was impartially applied in this instance. There had been no decision in the state holding or indicating that it was unreasonable. Like regulations often had been pronounced reasonable and valid in other jurisdictions and while some differences of opinion upon the subject were disclosed in reported decisions, the weight of authority was on that side. * * *
>
> "If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. And if it be assumed that the company should have known that the Supreme Court of the state, in the exercise of its judicial power, might hold the regulation unreasonable, even though the prevailing view elsewhere was otherwise, the question remains whether, in the circumstances, penalties aggregating $6,300, could be imposed without departing from the fundamental principles of justice embraced in the recognized conception of due process of law. In our

opinion the question must be answered in the negative. There was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct. Some regulation established a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or not, as it chose. It was engaged in a public service which could not be neglected. The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law" (citing cases).

Thus, according to the unequivocal language of this court, it is obvious that in the instant case the Arkansas Court, in penalizing appellant for acting pursuant to a rule thought to be reasonable, has deprived appellant of its property without due process of law, and that, in order to do so, the Court employed that same line of faulty and injudicious reasoning which was so severely criticized in the **Danaher** case.

Realizing, no doubt, that the **Danaher** case is almost a dead parallel for the instant case, and that its doctrine disposes of the question of jurisdiction herein, appellee attempts to distinguish the two on the ground that when the **Danaher** case arose the predecessor of Section 14261, supra, provided for penalties of $100.00 per day instead of $5.00 per day as now provided. Appellant is unaware of any distinction, so far as this Court's jurisdiction is concerned, between taking its property without due proc-

ess of law at the rate of $100.00 per day and at the rate of $5.00 per day. Certainly, the Constitution itself does not say that while $100.00 worth of property may not be taken, $5.00 worth may be.

## IV. THE BASIS OF DECISION IN THIS CASE IS UNREASONABLENESS OF THE RULE.

While, as will appear hereafter, federal questions under the Fourteenth Amendment, reviewable by this court, will remain in this case even if the ground of the decision by the Arkansas Court was not the unreasonableness of the rule, the appellee's assertion, in an effort to avoid the plain implications of the Danaher case, that such was not the rationale of the decision, but was mere dictum, is hardly allowable, as the following quotations from the Court's opinion will demonstrate:

> "This is not the first time that we have seen this rule, but it is the first occasion on which the requirements of the rule and the reasonableness thereof have been presented for our consideration. **City of Fort Smith v. Department of Public Utilities**, 195 Ark. 513, 518, 113 S. W. (2d) 100" (Tr. I, 17).

* * * * * * *

> "The agents for the telephone company by their evidence argued that the standard type service, when installed is for the sole use of the subscriber, whom they call a customer, and the members of his family and his employees, or members of the business organization. They argue also that if such customer permits someone else to use the telephone he violates a contract made for the installation of the instrument. Such is the contention of the appellant company and because that condition was not upheld by the trial court, the appeal in these two cases is for the purpose of setting aside and overturning the judgments of the

trial court. If under all the circumstances the contention is reasonable, based on a fair and natural classification of those who subscribed for and used telephones, we think it becomes our duty to uphold such contention as an established rule of the company, but, if, on the other hand, the distinction or so-called classification is artificial, arbitrary and without any sound basis in fact, the law will not support it" (Tr. I, 24, 25).

"* * * Therefore we think that the contention of the telephone company and its local agents that each telephone is located for the sole and exclusive use of the subscriber, the members of his family, and his employees, unreasonable, inasmuch as it fails to give consideration to the physical properties or mechanics of the telephone as well as the usual and ordinary controlling purposes of those who install such instruments in their places of business" (Tr. I, 25).

This quoted statement is followed by the Court's reasons therefor, which purport to show that such a rule is unfair, impractical and unreasonable, due to the nature of the telephone business. The Court sums up as follows:

"So it must appear, we think, that the classification intended to be made by the telephone company, or its agents, is without a sound basis in fact or reason" (Tr. I, 27).

If there could be any doubt left that the decision herein rests solely on the ground that the rule sought to be enforced was unreasonable, that doubt is removed and the Court, in its discussion, at pages 921-2, supra, of **Southwestern Tel. & Tel. Co. v. Sharp & White**, 118 Ark. 541, 177 S. W. 25, makes itself absolutely clear that such holding is the basis of its decision, where it stated that the **Sharp & White** case holds:

"* * * the telephone company has the right to make all **reasonable** rules and regulations for the oper-

ation and control of its business, and those who deal with it must comply with such **reasonable** rules and regulations, but this announcement may not be taken as an unlimited authority on the part of the telephone company to announce a rule, **the effect of which would result in reducing, impairing, or rendering an inferior service** with the same appliances and facilities used in rendering the standard or regular service, and thereby defeat the effect of regulatory statutes" (Tr. I, 27-28). (Emphasis ours.)

Thus it is clear that the only manner in which the Court even attempts to distinguish the **Sharp & White** case from the instant case is that the rule in the **Sharp & White** case was **reasonable**, whereas the rule sought to be enforced in the instant case was held by the court to be **unreasonable**.

## V. THE CONSTITUTIONAL QUESTIONS IN THIS CASE ASIDE FROM THE ADJUDICATION OF UNREASONABLENESS OF THE RULE.

### 1. The Court's Various Interpretations of the Penalty Statute Render It Unconstitutional in Application.

#### (a) By withdrawing the need for compliance with the rule.

If the basis of the decision of the Arkansas Court had not been that the rule was unreasonable, whatever other basis which might have been adopted would have led similarly to unconstitutional results, and the federal questions would have remained present in the case.

For example, if it could be said (as the appellee does) that the court did not declare the rule unreasonable and decide the case from that point of view, then it must be said that the court so construed and applied the penalty statute as to place the appellant in the same offensive predicament, as earlier described, of suffering under one

statute for complying with another. If the court leaves the rule (as it could scarcely be said to do) with the finding of reasonableness by the Department of Public Utilities, the court in affirming the plaintiff's judgment necessarily so interprets the penalty statute as to read out of it the plain requirement that the plaintiff, in order to maintain her case, must have offered to comply with the rule; because it has never been contended that she offered to comply with the basic rule limiting the use of her demanded flat rate customer service to herself, her family, and her business associates. While it was found, under disputed facts here precluded, that the plaintiff offered to comply with the subordinate rule respecting location of the instrument, it was never suggested that she offered to comply with the primary rule of restriction of her service. In her own testimony she said both that she wanted the service for use by "everybody" (Tr. II, 5) and that she would deny the use to nobody who might ask for it (Tr. II, 5).

With the statute so interpreted as to wipe out the requirement of compliance with the rule which we are now assuming was not declared unreasonable, we are returned to the doctrine of the **Danaher** case. The oppressive, unjust hardship imposed against the appellant by the application of the statute as then interpreted—an interpretation that allows of the infliction of penalties for conduct required by another statute—brings this case as surely within the principles of the **Danaher** case as the unexpected declaration of the unreasonableness of the rule.

The appellant, of course, does not contend that the penalty statute is unconstitutional per se, or in every application; but the appellant would so contend if the statute did not contain the requirement for compliance with the rules which the court is now interpreting out of it. As the section is now written, it would be easily reconcilable

with the Utilities Act so that the unconstitutional effect here complained of would be avoided simply by interpreting the "reasonable rules" with which compliance is required as the rules on file with the Department as required by the regulatory law. But the court's interpretation is quite otherwise, if it interpreted the section at all, and it is this interpretation, and the application as interpreted, that is repugnant to the restrictions of the federal constitution.

This court, of course, takes jurisdiction to determine the constitutional questions as readily when the complaint relates to construction and application of a statute as when it relates to an unalterable invalidity of a statute under all circumstances. For authority on this proposition, **Ward v. Krinsky,** 259 U. S. 503, may be added to the **Danaher** case.

(b) **By penalizing appellant for acts of its customers.**

Following on, if we continue to assume that the rule was not declared unreasonable (as we can't), and if we further assume (as again we can't) that the court would not have needed to interpret the penalty statute in the way of reading out the necessity for compliance with the rule, the decision would even so continue to work a denial of due process.

At the trial the plaintiff produced several witnesses who testified that they permitted anybody to use their telephone service which was furnished at the customer flat rate. No evidence was ever produced that the appellant ever knew of this practice of the witnesses who were put on in an attempt to prove that the appellant had discriminated in their favor against the plaintiff. All that their evidence proved, of course, was that without the knowledge of the company they were violating the rule in repudiation of their contracts with the company which

bound them to the observance of all the rules. All of the presumptions of law are in favor of compliance with the law and of performance rather than violation of compacts. The appellant was entitled to rely upon its customers to perform their contracts, and to observe the rules; and to interpret the penalty statute as warranting the infliction of penalties for the unknown violations of the rule by the appellant's customers, which necessarily occurred on the customers' own premises, is simply to add to the other denials of due process. Under this interpretation it would be impossible for appellant to avoid penalties by reason of the derelictions of its customers except by forsaking its constitutional right in the management of its business to establish reasonable classifications, reasonable rules and regulations, and reasonable rates.

There are hints, both in the court's opinion and in the appellee's statement, that the appellant might have known of these violations of its rule because the telephones had been in service in some instances for several years; but the patent fact is that because the appellant installed and maintained a telephone at any particular location is no reason to believe that the company knew what use was being made of it, or what use of it was being permitted by the customer. In this connection it ought to be observed that the company has many rules which it depends upon its customers to comply with, but whose violations occur on the customers' premises and are seldom apprehended. A single example of this (out of many possible illustrations) is the rule against the use of profanity and kindred language on the telephone. Under the interpretation of the penalty statute in the decision in this case, the appellant would suffer penalties for refusing telephone service to an applicant who advised that he wanted it almost exclusively for the purpose of expressing himself in obscenities, blasphemies, and profanities, if he could

produce someone else who would testify that unknown to the company he had sometimes engaged in little cussing on the telephone. It would appear to be perfectly plain that that analogous case could not stand the test of the Fourteenth Amendment. And neither can this one.

(c) **By requiring criminal conduct of appellant.**

Finally, even if (contrary to the record), the appellant had deliberately violated the Utilities Act in consciously permitting some customers to receive service at less than tariff rates, and in consciously permitting them, in disobedience to the Department's order, to employ their service in disregard of the rule, the appellant would be prevented by the decision herein from reforming its criminal behavior and complying with the Act thenceforth. It would be forced to continue to violate the Act in order to avoid the consequences of the penalty statute. It would be forced to engage in a crime for the plaintiff's gain because it had engaged in a crime for the benefit of someone else. It would be compelled to multiply its criminal offenses under the Utilities Act. It has probably never hitherto been suspected that a statute could stand the test of the Fourteenth Amendment when its application would require the commission of criminal offenses because similar criminal offenses had been committed earlier.

## VI. THE FEDERAL QUESTIONS WERE PRESENTED IN DUE TIME.

Since there was no decision in this case, the effect of which would be to deny to appellant the equal protection of the law and to take its property without due process of law until the Supreme Court of Arkansas rendered its opinion holding Rule V-C unreasonable, and since there was no way in which appellant could anticipate such a

holding by said court, the federal questions were first presented in appellant's petition for rehearing. A brief in support thereof was also filed, calling the Court's attention to the violation of the Fourteenth Amendment to the Constitution of the United States. It is well settled that a federal question raised at the first opportunity presented in trial of the case through the various stages comes in due time.

The raising of a federal question in a petition for rehearing does not come too late where the state court's ruling could not have been anticipated, and petition for rehearing presented the first opportunity for raising the federal question.

**Herndon v. Georgia,** 295 U. S. 441.

The federal question raised in a petition for rehearing does not come too late where the grounds of the original decision below supply a new and unexpected basis for the claim, by the defeated party, of the denial of a federal right.

**Great Northern R. Co. v. Sunburst Oil & Refining Co.,** 287 U. S. 358.

The raising of the federal question by assignment of error, even after the denial of a petition for rehearing in the highest court of the State, was permitted in **Saunders v. Shaw,** 244 U. S. 317, under a situation somewhat analogous to that in which appellant found itself in the instant case. This Court stated as follows:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course, ordinarily that would not be

enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

---

Inasmuch as the appellant perceives the sole basis of the decision in this case to be the unreasonableness of the rule, this discussion has probably been unnecessarily prolonged; but this is owing to the appellant's anxiety to point to the federal questions present under every conceivable basis for decision. If this court should entertain any doubt respecting the basis of the decision, it is expected that there will then be present a situation analogous to that encountered in Minnesota v. National Tea Co., decided by this court March 25, 1940 (84 L. ed. [Adv. Ops.] 571), and that the case will be remanded to the state court for clarification of its basis of decision.

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We conclude that federal questions conferring jurisdiction in this court are present under any theory of this

case, and we urge that jurisdiction be noted and that the cause be heard for the purpose of resolving the aforesaid federal questions.

Respectfully submitted,

E. W. CLAUSEN,
BLAKE DOWNIE,
JOHN MOHLER,
EDW. B. DOWNIE,
Attorneys for Appellant.

FILE COPY

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AUG 2 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 299

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SOUTHWESTERN BELL TELEPHONE COMPANY,
*Appellant,*

*vs.*

CARRIE C. LEE.

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

---

W. Y. Rosier,
Thos. F. Butt,
David Mallory,
Suzanne Chalfont Lighton,
*Counsel for Appellee.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

---

# No. 299

---

SOUTHWESTERN BELL TELEPHONE COMPANY,
*Appellant,*

*vs.*

CARRIE C. LEE,
*Appellee.*

---

## OPPOSING STATEMENT BY APPELLEE AS TO BASIS OF JURISDICTION AND MOTION TO DISMISS THE APPEAL.

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Pursuant to Rule 12, Subdivision 3, of the General Rules of the Supreme Court of the United States, appellee files this, her statement of grounds making against the assertion of jurisdiction by the United States Supreme Court in the premises.

It appears from the record of the judgment and cause sought to be reviewed herein as well as by the statement as to the basis of jurisdiction filed by appellant herein, that no Federal question was involved or decided, inasmuch as said judgment was rendered by the trial court in the first instance, and affirmed by the Supreme Court of Arkansas, pursuant to the verdict of the jury, based solely upon the factual issue of discrimination, wherein was contained no

Federal question of any nature whatsoever; and therefore no jurisdiction exists in this court, no matter how invoked, to review the said judgment.

That no treaty or statute of the United States was declared invalid; and no statute of any State was declared valid in the face of any attack thereon on the ground of its being repugnant to the Constitution, treaties or laws of the United States; and therefore under the provisions of Title 28 U. S. C., Section 344 (a), no jurisdiction for review of said judgment exists in this Court.

That there was not drawn into question the validity of any treaty or statute of the United States, nor of any statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States; nor was there specially set up or claimed by either party hereto any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States; and therefore, under the provisions of Title 28 U. S. C., Section 344 (b), no jurisdiction for a review of said judgment exists in this Court.

Appellee is not unmindful of the fact that by the simple assertion of the non-existence of a Federal question in this case, she has practically exhausted her persuasive powers in this respect. The case is now before this Court on appeal, and speaks for itself far more effectively than can counsel. However, to the end that the court may be made more fully cognizant of appellee's exact position, she offers the following in support of her major premise—the absence of a Federal question.

This case was commenced under Section 14261 of Pope's Digest of the Statutes of Arkansas, which reads as follows:

> "Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities, without discrimination or partiality, within

ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are (is) not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars and five dollars per day for each day from the expiration of such notice until said demand is complied with or suit is instituted for failure to comply with such demand, for such discrimination, after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. Any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same, and the courts shall hear such applications either in vacation or term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith until such orders are vacated by order of the court or judge at Chambers, or such suit is finally determined."

Under the clear terms of this statute, appellee must have established two things before she would be entitled to recover the penalties provided: (1) That there had existed, as between herself and others in like situation with her, a discrimination against her, practiced by appellant; (2) that upon her demand for service she had complied or offered to comply with the reasonable rules of appellant.

From their very natures, these questions were, and could be only questions of pure fact, the decision of which devolved upon, and were conclusively answered by, the jury. This, then, is the whole case. The relevant statute quoted

above, was never attacked by appellant as being unconstitutional under the Federal Constitution, and for this reason, it may not be said that its validity was sustained by the Arkansas Supreme Court, in the sense as used in 28 U. S. C. Sec. 344 (a) or (b), *supra*. Further, no title, right, privilege or immunity was ever set up by appellant, under the Constitution or laws of the United States, up to and including the final judgment of the Arkansas Supreme Court, in the sense as used in 28 U. S. C., Sec. 344 (b).

The only conclusion possible is that there simply is not any Federal question in this case. It follows that regardless of how impressively formal may be the assignments of error in this regard by appellant, this Court has no jurisdiction to review the judgment. *Zucht* v. *King*, 260 U. S. 174; *Quong Ham Wah Co.* v. *Comm'sn.*, 255 U. S. 445; *U. S. F. & G.* v. *Oklahoma*, 250 U. S. 111.

It is not entirely clear from appellant's assignments of error or its statement in support of jurisdiction, just what is the basis of its claim of Federal jurisdiction—whether it be because the statute, Section 14261 was held invalid, or because appellant's rule V-c was held unreasonable, or both. In any event, appellant's claim is ineffectual. As pointed out above, the discrimination statute was never attacked, and in truth was never even "construed" by the Supreme Court of Arkansas, simply because no construction was necessary. If the Arkansas court's alleged ruling on appellant's rule V-c be the gravamen of the latter's complaint herein, this, likewise avails appellant naught. Appellant admits (page 1, appellant's statement in support of jurisdiction) that rule V-c is its own rule, and not that of the Arkansas Department of Public Utilities. Therefore, in holding the rule unreasonable, (if it did such) the Arkansas court was not invalidating the order of any State legislative body, nor acting in a legislative capacity, since only appellant had made this rule. Further, the Depart-

ment of Public Utilities did not make the rule its own, but only ordered an impartial enforcement of it. This is the very thing that the jury in the trial court, and the Supreme Court of Arkansas found appellant had not done. Therefore, no repugnance exists between the positions taken by the Arkansas court and the Department of Public Utilities.

A further interesting observation relative to this rule V-c may be made at this point. Appellant has much to say concerning the absence of any notice and hearing afforded it as to the reasonableness of the rule, and hinges thereon its claim of property deprivation. The answer is simple. No notice and hearing was provided, for the reason that none was necessary; the rule was not being, and has never been attacked by appellee. Indeed, appellee has always offered to comply with this very rule. And here in passing, it might be noted that appellant's cited "due process" cases are accordingly not pertinent in this case. Finally, it is exceedingly doubtful that the Arkansas Supreme Court did in fact declare rule V-c unreasonable *per se*. And even if it did so, appellee submits that the court's language in that respect is purely dictum, and may therefore not be employed by appellant to support an alleged Federal question so as to confer jurisdiction upon this court.

Let us see. After quoting the rule in full (140 S. W. 2d 133-134), which requires only that the instrument be located in a place not accessible for public use, the court continues, (pp. 134-135): "It is her (appellee's) contention • • • that she offered to comply with the reasonable rules and regulations of the company, even including the requirement that the telephone be placed under a counter, in a showcase, or in a compartment. The dispute in this regard is that the telephone company insists now that it was not installed because she did not agree to promise to refuse permission to use the telephone in a new location, though she did agree to conform with all reasonable

rules and regulations of the company. No examination of the foregoing rule will disclose that she should act as a guard for the telephone company to prevent the use of the telephone, nor is there anything in this entire record • • • indicating • • • a grant of power • • • to the telephone company to exact a promise from her, in addition to the one to abide by the reasonable rules and regulations of the company."

Elsewhere in the opinion, the court finds, as it must have done, that the issue of appellee's offer to comply with the reasonable regulations (including rule V-c) of appellant had been settled in appellee's favor by the jury's findings, as likewise on the primary factual issue of discrimination. It appears therefore that the court's opinion was based purely on confirmation of the factual question presented to it, and that its holding only that the *application*, or unauthorized extension of the rule by appellant was bad, and not that the rule itself is invalid. It follows logically, then, that no Federal question is presented or could be presented on this appeal, and that even if by some manner of legal legerdemain such a question could be conjured up, the decision thereof was not essential to the judgment of the Arkansas court.

Appellee cannot too strongly urge upon the sensibilities of this Court this one essential point: That this case was not instituted nor decided on the basis of any rule of service (rule V-c, or otherwise), but purely on the theory of *discrimination*, a *factual* concept, which was decided and concluded by the jury. The decision of the Arkansas Supreme Court does ont hold otherwise. Accordingly, no Federal question is present here.

But even if for purposes of argument, it be assumed that a Federal question did arise, still, that portion of the Arkansas court's opinion relative to rule V-c is only dictum, and was not necessary to its opinion and decision because the reasonableness of the rule was never traversed. The

legal rule in this respect is well settled. It is essential that the decision of the State court *of necessity* involve a determination of the Federal question. It must appear affirmatively that the court could not have decided as it did unless it had decided the Federal question, and that such decision was not in any sense obiter. *Brown* v. *Atwell*, 92 U. S. 327; *Vandalia R. Co.* v. *Indiana*, 207 U. S. 359; *Adams* v. *Russell*, 229 U. S. 353; *Whitney* v. *California*, 274 U. S. 357; *Lynch, et al.* v. *New York, ex rel. Pierson*, 293 U. S. 52; *Honeyman* v. *Hanan*, 300 U. S. 14; *S. W. Bell Tel. Co.* v. *Oklahoma*, 303 U. S. 206.

So here, even conceding appellant its vainly striven Federal question (and bear in mind, appellee is nowhere recognizing this), it becomes apparent that the decision of the alleged Federal question was in no way essential to the opinion of the Arkansas court, and also that there existed an adequate non-Federal ground on which to base the court's opinion, *i. e.*, the factual issue of discrimination. Now much more tenuous and unreal, therefore, is the suggested jurisdiction of this Court, in view of the fact that there exists herein no Federal question at all.

Another defect: Appellant's supposed bases for the jurisdiction of this Court are shot through with vagueness and non-particularity. The burden of appellant's complaint throughout its assignments of error and in support of jurisdiction, when summed up, amounts to no more than a claim that the Arkansas court erred in not reversing the judgment of the trial court, because the scope and effect of the discrimination statute, Section 14261, *supra*, deprived appellant of its property in violation both of the due process and equal protection clauses. As hereinbefore observed, it is difficult to ascertain just what appellant is driving at, inasmuch as it skips from Section 14261 to rule V-c, and back again, and finally winds up by asserting both. It is plain then, that the constitutional question is frivolous,

unsubstantial, indefinite and fictitious and thus presents no question for this Court's consideration. *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86.

Finally, sweeping aside the requirements that there be a Federal question; that it be substantial, that it must necessarily have been decided by the State court; and sweeping aside the requirements of 28 U. S. C. Sec. 344 (a) and (b), appellee submits that this question, whatever be its nature, this *thing* appellant relies upon, has been set up too late. To urge upon this Court a jurisdiction based upon a question raised for the first time in its petition for rehearing to the State Supreme Court, is but the last gasping effort of an unwilling litigant to avoid answering for its mistaken policies. If appellant conceived the existence of a Federal question in this case, the time to have asserted it was at the trial of this case in circuit court. Appellee brought her action under Section 14261. Rule V-c was not in her mind in connection with this suit save that she had offered to comply with it, as she must have done under the statute. Why, therefore, did not appellant complain then of the statute? Confronted with such an action, why did not appellant then assert its Federal question? Why? Because no Federal question existed; because no construction of this statute was contemplated or was necessary; because no Federal question has ever existed in this case. To come now and invoke the jurisdiction of this Court, on the ground that there exists a Federal question, when appellant never thought of such a thing until its petition for rehearing in the Arkansas Supreme Court, is, in itself, almost a confession of "no jurisdiction". *Consolidated Turnpike Co.* v. *Norfolk*, 228 U. S. 326; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *St. L., Etc. R. Co.* v. *Shepheard*, 240 U. S. 240.

Appellee would at this point beg the Court's indulgence for the length and formal unorthodoxy of this statement against jurisdiction, and motion to dismiss the appeal. But appellant's pleadings and papers herein are so involved and so adroitly worded that it is incumbent upon counsel for appellee to answer a number of appellant's statements and assertions, in order, not only that appellee's cause be well and truly advocated, but also that this Court may not be misled by suavity of language or sublety of innuendo.

On page 2 of appellant's statement in support of jurisdiction, it is stated that the plaintiff (appellee here) demanded semi-public telephone service at the rate provided for the more restricted customer classification—the latter being the type of service to which rule V-c would apply. This statement is wholly and absolutely false. Let the record speak in answer to this assertion of appellant (R. 2, 3, & 4). The only type of service ever requested by appellee was that type variously denominated as "customer service", or "straight or regular business telephone service" at the lawful rate of $3.50 per month. Appellee has never requested that service be provided her at less than prescriber rates.

On page 3 of appellant's statement, it is asserted that plaintiff's claim at the trial was that because other persons were receiving semi-public service at the lower customer service rate, she too was entitled to such service, and that appellant's refusal to "violate the Utilities Act in her case" subjected appellant to the penalties of Section 14261. This assertion is likewise wholly and absolutely false. While it may well be that such a situation was a discrimination in fact against appellee, such was not relied upon by appellee nor ever advanced by her in support of her action. The whole theory of appellee's case was that she had been unlawfully discriminated against because appellant had

failed and refused to furnish her with *any service whatsoever*, whereas others in like situation with her were given service. Never, at any time did appellee demand that appellant violate the Utilities Act in her favor by extending to her standard service at a less-than-legal rate.

It was upon this theory of appellee's case that the jury found discrimination and upon which the Supreme Court of Arkansas affirmed the judgment below. Appellant would have this Court believe that the case was affirmed because the court held rule V-c unreasonable upon collateral attack. Appellee has hereinbefore demonstrated the transparency of this argument. Here was no collateral attack. The plain truth is that penalties were assessed against appellant, not because the rule was or was not unreasonable, but because appellant had been guilty of discrimination wholly dehors the rule. The alleged collateral attack is non-existent, for the reason that no attack was ever made upon the rule at any stage of the case. The remarks of the Arkansas Supreme Court, though perhaps richly deserved by appellant, were no more than that tribunal's opinion about something which was not before it—in short, its language is dictum.

Throughout appellant's statement, it makes its specious appeal to the sympathy of this Court. According to appellant, if it abides by Section 14261, in order to avoid penalties thereunder, it must perforce subject itself to liability for violation of the Public Utilities Act (Pope's Digest, Section 2121-2124); or, if it complies with the Public Utilities Act it thereby makes itself liable for penalties under Section 14261. The fallacy of appellant's argument is readily discernible. It has already received judicial condemnation, by the Arkansas Supreme Court, which held categorically that there is no repugnancy between Section 14261 and the Public Utilities Act. (*S. W. Bell Tel. Co.* v. *Matlock*, 195 Ark. 168.) Secondly, as a matter of logic, if, as appellant insists, rule V-c has been declared unreasonable, appellant is

constitute matter for adjustment as between the individual wronged by the violation (discrimination) and the Utility. That a discrimination might be practised by a telephone company which would be unlawful under Section 14261,

of the rules set by the Public Utilities Act is a proposition so plain and simple as to be apparent to a six-year old. Thus, appellant's "anomalous and inequitable" position is revealed in its true light as no more than the product of its own devious but nonetheless spurious logic.

In point of fact, this ruse of appellant's being discovered and set at naught, its whole claim to this Court's jurisdiction falls to the ground like paw-paws after frost. For, under appellant's theory, Section 14261 was "construed" by the Arkansas Supreme Court so as to produce the result contended for by appellant above. If no such construction was in fact made (and it could not have been so made) then the appeal to this Court's jurisdiction of necessity fails.

Appellant cites and relies upon *S. W. Tel. & Tel.* v. *Danaher*, 238 U. S. 482. The company rule in that case was that service could be refused and no discount allowed for paying bills promptly, if the subscriber was in arrears on his telephone bill. The Supreme Court of Arkansas held this rule unreasonable. But in the cited case, the company was denied the right to prove or seek to prove non-compliance, on the part of the plaintiff, with this rule, which was certainly error. In the case at bar, no such element appears. Appellant was left free and unhindered to put all the proof at its command before the jury that appellee did not comply or offer to comply with rule V-c. The result, as determined by the jury was that appellee had offered to comply with this rule, and therefore no error can be predicated upon this basis, as there was in the *Danaher*

case, *supra*. Furthermore, the emphasis placed by this Court upon the then statutory penalty of $100.00 per day leads to the permissible inference that one not inconsiderable element of this Court's disapproval lay in the severity of the penalty. The statute now in effect, Section 14261, provides for a penalty of $5.00 per day.

It should be noted further that this same *Danaher* case, after having gone twice to the Arkansas Supreme Court, and once to this Court (*supra*), found its way once more to the Supreme Court of Arkansas, *Danaher* v. *S. W. Tel. & Tel. Co.*, 137 Ark. 324. There, pursuant to the mandate of this Court, the Arkansas Court remanded to the Circuit Court for a new trial. Complaint was filed, alleging facts relied on to establish discrimination, under the predecessor of Section 14261, and alleging, also pursuant to the statute, compliance with defendant's reasonable regulations. Defendant's demurrer to the complaint was sustained and plaintiff appealed. The Arkansas Supreme Court said (p. 331):

> "Neither this court nor the Supreme Court of the United States has yet declared the statute unconstitutional, upon the state of facts alleged in the complaint, the truth of which the demurrer admits."

The court then reversed the judgment and remanded to the trial court with directions to overrule the demurrer.

So here, in the case at bar, appellee's complaint simply set up facts which she claimed constituted discrimination and alleging her offer of compliance with the reasonable rules of appellant company. Upon issues joined, and trial had, the jury found for appellee on these purely factual questions. In such a state of the record, how can it be seriously urged that a Federal question was presented or that such a question must have been decided by the Supreme Court of Arkansas in affirming the judgment?

Appellant would next, on page 10 of its statement, have this Court believe that in any event, appellant was deprived

of property without due process of law, since this case is governed by *S. W. Tel. & Tel.* v. *Sharpe & White*, 118 Ark. 541, and that the Arkansas court did not follow this case. It has always been appellee's understanding that a court of last resort is the most competent judge of its own decisions, as to their relevancy and applicability to later cases. Perhaps appellant is introducing a new theory into appellate practice by suggesting that courts of last resort should in a given case yield to the persuasions of counsel.

Again, this case does not present a question of permitting appellant to mend its ways (a confession of past guilt), as contended by it on page 11 of its statement. The question in this case is one of liability for penalties for an unlawful discrimination knowingly and systematically pursued.

Appellant next asserts, on pages 11-12 of its statement that appellee was offered the service requested at the legal rate therefor, but that she refused it, and that the Arkansas Supreme Court's decision in effect holds that appellee need not have complied with appellant's reasonable regulations. Further, that penalties were assessed against appellant because the Arkansas court found that other customers of appellant were violating their contracts with appellant; and that if this be true, there was no evidence that appellant knew of such violations. Appellee's answer to these erroneous propositions of appellant's is simple and is sustained by the record. Despite appellant's claim as to the kind of service offered appellee, the fact remains that she was denied legal services of any kind at any rate, even though she had offered to comply with appellant's rules. As for appellant's interpretation of the Arkansas court's opinion on the question of compliance, this decision does not and could not hold as appellant says. The whole basis of appellee's case is that she must have complied or offered to comply with the appellant's reasonable regulations. The jury found that she had so offered to comply. This question is therefore rendered moot.

Again, while it may be true that the evidence incidentally disclosed that other customers of appellant were violating their contracts, this fact signifies nothing. Penalties were assessed against appellant because it had failed and refused to furnish appellee with any service at all, while others like her were served. Herein lay the discrimination. Appellant further claims that it did not know of such violations by its other subscribers, and that there was no evidence of same. And it is true that there was no evidence, other than that each witness who was a subscriber was shown to have been a subscriber of several years' standing. In such a situation, with appellant rendering them continuous service, maintaining their lines, and collecting their rentals, appellant's assertion in this respect is a *reductio ad absurdum* of legal and logical reasoning and avails it nothing.

**Summary and Conclusion.**

To the end that this Court may be left with the clearest understanding of appellee's position, she concludes her necessarily lengthy statement against jurisdiction, and motion to dismiss, with a summary of her principal grounds therefor:

1. No Federal question of any kind was or is present in this case, since it involves only questions of fact already concluded by the jury at the trial of the case, and affirmed by the Supreme Court of Arkansas on that basis; therefore, no jurisdiction exists in this Court, no matter how invoked.

2. None of the requisites of either 28 U. S. C. 344 (a) or (b) is present in this case, therefore, no jurisdiction exists in this Court on review.

3. Even if a Federal question were present in this case, the decision of the Supreme Court of Arkansas herein did not, of necessity, require a determination of such Federal question, and accordingly, under the general and well-settled rule, no jurisdiction for review exists in this Court.

4. Further, since the language of the Supreme Court of Arkansas relied upon by appellant herein as setting up the alleged Federal question was and is only *obiter dictum*, and not essential to the decision of this case by said court, it follows, under the accepted rule, that no jurisdiction for review exists in this Court.

5. Inasmuch as there was in this case an adequate non-Federal ground upon which the decision of the Supreme Court of Arkansas could have been, and was based, if follows that, under the general rule, no jurisdiction for review exists in this Court.

6. Finally, that even though appellant be conceded its Federal question, which appellee does not, since it affirmatively appears from the record and judgment herein that the alleged Federal question was not raised by appellant until after the final judgment of the Supreme Court of Arkansas it follows, under the general rule, that appellant has not asserted the existence of a Federal question and consequent jurisdiction of this Court, at the proper time, and therefore no jurisdiction for review exists in this Court.

WHEREFORE, the foregoing premises considered, appellee respectfully moves that the appeal herein be dismissed by this Honorable Court.

Dated July 15, 1940.

(S.) W. Y. ROSIER,
THOS. F. BUTT,
DAVID MALLORY,
SUZANNE CHALFONT LIGHTON,
*Attorneys for Appellee.*

No. 299. SOUTHWESTERN BELL TELEPHONE CO. *v.* LEE; and

No. 300. SAME *v.* HANNA. Appeals from the Supreme Court of Arkansas. October 14, 1940. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a properly presented federal question. *Godchaux* v. *Estopinal*, 251 U. S. 179; *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114, 117; *Herndon* v. *Georgia*, 295 U. S. 441, 443. *Messrs. Edward B. Downie* and *E. W. Clausen* for appellant. *Suzanne Chaljant Lighton* for

appellee in No. 299. *Mr. Charles D. Atkinson* for appellee in No. 300. Reported below: 200 Ark. 318; 140 S. W. 2d 132.